vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.232 OF 1993

1. Jeles Education Society
c/o. Mahatma Gandhi Vidya Mandir
Principal Shirsekar Marg
Bandra(E), Mumbai -51

2. The Head Master
Mahatma Gandhi Vidya Mandir
P.S. Marg, Bandra (E),
Bombay-51 ... Petitioners

V/s.

1. Shri R.T. Bhitale
182/4, Sita Sadan, Dattaram Lad
Path, Kalachowki, Bombay

2. The Presiding Officer
School Tribunal, Gr.Bombay
P.W.D. Barracks, D.W. Road
Churchgate, Bombay-20 ... Respondents

Mr.S.G. Deshmukh for Petitioner
Mr.N.V. Bandiwadekar for Respondent No.1

a/w

WRIT PETITION NO.10576 OF 2004

Shri R.T. Bhitale
182/4, Sita Sadan, Dattaram Lad
Path, Kalachowki, Bombay ... Petitioner

V/s.

1. The Secretary
Janardhan Laxman Shirsekar
Sikshan Sanstha
Principal J.L. Shirsekar Marg
Bandra(E), Mumbai-51

2. The Head Master
Mahatma Gandhi Vidya Mandir

P.S. Marg, Bandra (E), Mumbai-51 ... Respondents

Mr.N.V. Bandiwadekar for Petitioner
Mr.S.G. Deshmukh for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

JUDGMENT RESERVED ON: **OCTOBER 7, 2005**
JUDGMENT PRONOUNCED ON: **OCTOBER 28, 2005**

JUDGEMNT:

. Writ Petition No.232 of 1993 has been filed by the Education Society which runs the school in which the concerned teacher was employed. Writ Petition No.10576 of 2004 has been filed by the concerned teacher. For the sake of convenience, the Petitioner in Writ Petition No.232 of 1993 who is Respondent No.1 in Writ Petition No.10576 of 2004 will be referred to as the "School" and the Respondent in Writ Petition No.232 of 1993 who is the Petitioner No.10576 of 2004 will be referred to as the "teacher".

2. The teacher was employed in the school from 7.12.1987 upto 30.3.1988. He belongs to other backward classes. He was appointed in a vacancy which was reserved for the Scheduled Tribe category as his appointment was upto the end of the academic year 1987-88. His services came to an end at the end of that academic year on 30.3.1988. An appeal was filed by the

teacher in the School Tribunal immediately after he was terminated from service. This appeal was decided by an order dated 26.6.1992. The School Tribunal allowed the appeal and held that the termination notice dated 30.3.1988 issued to the teacher by the school was illegal. Accordingly, the School was directed to reinstate the teacher with continuity of service. Full backwages were awarded after adjusting the salary earned by the teacher in other schools during the pendency of the appeal. Writ Petition No.232 of 1993 filed by the school challenges the order of the School Tribunal. While admitting the petition on 5.3.1993, backwages were stayed on condition that a lumpsum amount of Rs.15,000/- was paid by the school to the teacher without prejudice to their rights and contentions. The school was directed to appoint the teacher on a year to year basis again without prejudice to their rights and contentions in the petition. Accordingly, the school reinstated the teacher. He continued to work in the school on an yearly basis.

3. On 19.1.1995, the teacher applied for leave of 23 days as he had submitted his nomination for being elected to the Maharashtra Legislative Assembly from the Rajapur constituency. The school by its letter dated 31.1.1995 refused to sanction the leave. It appears

that the teacher without awaiting the sanction, proceeded on leave. When he returned, he was not permitted to resume duty by the school. A complaint was lodged by the teacher with the Education Inspector on 14.2.1995. On 16.2.1995, the teacher's services stood terminated by the school. The teacher was informed by this letter that he had proceeded on leave without sanction thereby causing loss to the students. The assessment of the 4th Unit test and other work was left incomplete by the teacher. The school informed the teacher that his leave application had been rejected and that he should submit his resignation within 10 days of the receipt of the letter. It appears that the teacher did not submit such a resignation and instead lodged a complaint with the Education Officer. On 16.12.1995, the teacher was informed that the school had not excused his irresponsible behaviour and it was decided to terminate his services with effect from the date of his absence from the school. After the receipt of this letter on 8.4.1995, the teacher forwarded his explanation regarding the incomplete work. This explanation was not acceptable to the school. The teacher, therefore, filed appeal No.MUM/15/95 before the School Tribunal. By an order dated 7.5.2004, the School Tribunal dismissed the appeal. The Tribunal observed that under Rule 42(2) framed under the MEPS Act when a

teacher desires to contest an election, previous permission must be sought from the school management. The Tribunal held that the teacher's irresponsible behaviour had resulted in adversely affecting the students as he had not completed the course work nor had he assessed the answersheets in respect of 4th unit test. The Tribunal was of the view that the school had correctly invoked the provisions of Rule 42(3) by seeking the teacher's resignation. The appeal was, therefore, dismissed.

4. The learned Advocate appearing for the School submits that the teacher was appointed only for a temporary period from 7.12.1987 to 30.4.1988 and this temporary appointment came to an end by efflux of time. He submits that there can be no question of reinstating the teacher as his appointment was against a reserved category post and the appointment was only for a temporary period. The learned advocate places reliance on the judgment of the Apex Court in the case of *Hindustan Education Society & Anr. v/s. Sk.Kaleem Sk.Gulam Nabi & Ors.*, **AIR 1987 SC 2126.** He submits that the view taken earlier by this court that if a person is appointed against a clear vacancy for a temporary period his services cannot be terminated at the end of that period has been impliedly overruled in the case of

Hindustan Education Society (supra). According to the learned Advocate, the teacher is not entitled to be reinstated at all. Furthermore, he submits that the post was reserved for a candidate belonging to the scheduled caste. The teacher belonged to the other backward class and, therefore, was not entitled to continue in service. According to the learned Advocate, the roster was produced in Court indicating that the vacancy was for a person belonging to the scheduled caste. The learned Advocate has further relied on the various resolutions to submit that merely because the teacher was appointed in place of scheduled caste candidate, he could not as a matter of right continue in employment beyond 30.4.1988. He therefore urges that the school's writ petition be allowed and the impugned order be set aside.

5. The learned Advocate appearing for the teacher submits that the post against which the teacher was appointed was a reserved post for a candidate belonging to the scheduled caste. Since no suitable candidate belonging to this category was available for being appointed, the teacher was selected and appointed to the post although he belonged to the other backward class category. The learned Advocate submits that under Rule 9(9)(a), if there is no person belonging to the category

for which the vacancy has been reserved, a candidate from any backward class can be selected and if no such candidate is available then the post can be temporarily filled on a year to year basis by a candidate not belonging to the backward classes. Accordingly, the school had accepted the candidature of the teacher and had appointed him against a post reserved for the Scheduled Castes. The appointment of the teacher against this vacancy cannot be termed as a temporary employment. He cites the decisions in *Shakuntala Ganpatsa Shirbhate v/s. Industrial Weaving co-operative Society & ors.,* **AIR 1994 SC 36**; *Ms.Kunda Prabhakar Bhangale v/s. Samaj Seva Mandal & Ors.*, **Writ Petition No.3085 of 1996**; *Ravindra C. Chaudhari v/s. The State of Maharashtra & Ors.,* **Writ Petition No.1892 of 2000;** *Shri Manohar R. Gavali v/s. The Chairman, Kankavali Shikshan Sanstha & Ors.*, **Writ Petition No.3000 of 2003** and *Ganesh S. Dhurate v/s. Maharashtra Bhatkya Vimukti Jati Shikshan Prasarak Mandal Ors.*, **2002(4) ALL MR 652** in support of his submission that the condition of employment for a year to year basis is not applicable to candidates who are appointed from the backward classes against the reserved vacancy meant for a candidate belonging to a different reserved category.

6. As regards the termination of services of the

teacher in 1995, the learned Advocate for the teacher submits that this Court has already held in the judgment of *Bombay University & College Teachers' Union v/s. State of Maharashtra & Anr.*, **1990 Mh.L.J. 562** that Rule 42(4) is ultra vires the constitution and it has been set aside. Therefore, no permission is necessary from the School before contesting an election. It is then submitted on behalf of the teacher that if the school had any grievance about his work or his so called irresponsible behaviour, the school ought to have issued a chargesheet to him and held an enquiry before terminating his services. The learned Advocate urges that the order of the School Tribunal dated 7.5.2004 is required to be set aside as it does not conform with the decisions of this Court and of the Apex Court. The learned Advocate submits that the termination order dated 16.2.1985 is an order which is punitive in nature which ought to have been preceded by a domestic enquiry.

7. Rule 9(9)(a) reads thus:

> 9. Appointment of staff.... (9)(a) in case it is not possible to fill in the teaching post for which a vacancy is reserved for a person belonging to a particular category of Backward Classes, the post may be filled in by selecting a candidate from other remaining categories in the order specified in sub-rule (7) and if no person from any of the categories is available the post may be filled in temporarily on an

year-to-year basis by a candidate not belonging to the Backward Classes.

8. Therefore, the management of any school is entitled to appoint a person who belongs to the backward classes if a suitable candidate is not available from the category for which the post is reserved. Such an appointment is not expected to be on a temporary basis as held in *Shakuntala G. Shirbate* (supra) and the judgments cited by the learned Advocate in *Ms.Kunda Prabhakar Bhangale* (supra); *Ravindra C. Chaudhari* (supra); *Shri Manohar R. Gavali* (supra); and *Ganesh S. Dhurate* (supra). The stipulation that the posts could be filled temporarily on a year to year basis does not apply to candidates who belonged to backward classes and who fill the post belonging to the reserved category, although they do not belong to that particular reserved category. The stipulation applies only to candidates who are from the open category and have been appointed against reserved category vacancy. In my view, therefore, the Tribunal has not committed any error in allowing the appeal filed by the teacher and which order has been impugned in writ petition No.232 of 1993. After the earlier teacher Mrs.Raut had resigned, advertisements were issued for an English teacher. The advertisement did not specify as to whether the vacancy was a clear one. Nor did the appointment letter issued

to the teacher indicate that his appointment was against a vacancy reserved for the backward classes. The case of the school that because the appointment was only for a temporary period and as a stop gap arrangement the services could not be terminated cannot be accepted. The reliance placed on the judgment in the case of *Hindustan Education Society* (supra) and **Writ Petition No.3488 of 1999** (supra). This judgment does not make a distinction between persons appointed for a temporary period from the backward classes and from the open category. However, the interpretation of Rule 9(9)(a) of the MEPS Rules was not in question in these judgments. A harmonious reading of the judgments in *Hindustan Education Society* (supra) and *Shakuntala G. Shirbhate* (supra) will indicate that a person belonging to an open category cannot question his appointment made only for a temporary period against a reserved vacancy. However, when a suitable candidate belonging to a particular reserved category is not available and another from the backward classes is appointed, his appointment cannot be considered to be a temporary appointment although the appointment letter stipulates so. In my view, therefore, the judgment of the School Tribunal which has been impugned in writ petition No.232 of 1993 must be upheld.

9. The question now which is required to be considered is whether the school has committed any illegality by terminating the services of the teacher on 16.2.1995. There can be no dispute that permission is not required from the school, prior to a teacher contesting elections to the Legislative Assembly. The rule which requires the teacher to seek such a permission has been set aside in the case of *Bombay University & College Teachers' Union* (supra). The Division Bench of this Court has held that Rule 42(2)is violative of Article 14 of the Constitution of India insofar as it provides that employees who wish to contest elections to public offices other than the universities, senate and the Maharashtra legislative council may do so only with the previous permission of the management in writing. The stipulation "with the previous permission of the management in writing" has been held to be ultra vires. However, in the present case, the services of the teacher have been terminated not because he did not attain prior permission from the management of the school to contest the elections but because he had proceeded on leave without prior sanction. It was also found by the School that this action of the teacher had caused irreparable hardship to the students as their answersheets for the 4th Unit test had remained to be assessed by the teacher and he had

completed the syllabus which was expected of him. The school had found this behaviour of the teacher to be most irresponsible and therefore, had terminated his services under rule 42(3). Rule 42(3) reads as under:

> 42(3). Immediately after filing the nomination form for contesting such election and the same being declared as valid, the employee shall proceed on leave due and admissible to him; and if no leave is to his credit, he shall proceed on extraordinary leave, and shall continue to be on leave till the declaration of the election results:
>
> Provided that the Management may require a temporary employee contesting such election to resign his post even during the election campaign, if in the opinion of the Management, the election campaign is likely to adversely affect the duties of the employee.

10. The proviso makes it very clear that the management of the school may require a temporary employee who wishes to contest the elections to resign from his post if in the opinion of the management, the election campaign would adversely affect his duties as an employee. In the present case, the management had initially by their letter dated 31.1.1995 called upon the teacher to resign from service under the proviso to Rule 42(3) since it was felt that his proceeding on leave would adversely affect the students. The teacher having failed to do so, the school informed him that his services were terminated. The Tribunal has concluded

that the appointment of the teacher was in a clear vacancy. I have already observed that the view taken by the Tribunal in the earlier appeal filed by the teacher which has been impugned in writ petition No.232 of 1993 is correct. Therefore, the question is whether Rule 42(3) can come to play if the appointment has already been held to be a permanent one. The proviso to Rule 42(3) in my view, is available to the school management only if the employee can be considered to be on a temporary appointment. Having already held that the appointment of the teacher was not a temporary one, in my view, the proviso to Rule 42(3) is not attracted at all. The decision of the School Tribunal that the proviso to Rule 42(3) is attracted must be set aside.

11. However, the question which now remains to be considered is whether the termination from service is legal or not. A permanent employee can be terminated from service only after issuing a notice to him as required under the MEPS Act and the Rules framed thereunder. Rule 28 of the MEPS Rules stipulates that the services of a permanent employee can be dispensed with only after an enquiry if the termination is on account of misconduct, moral turpitude, willful and persistent negligence of duty and incompetence. In the present case, no such enquiry was held prior to

terminating the services of the teacher although the termination of service was on account of negligence and other alleged acts of misconduct. The appointment of the teacher after the order at the admission stage in writ petition 232 of 1993 was on a year to year basis. That order was only as an interim measure. Having concluded that the appointment of the teacher was a permanent one, it is obvious that the subsequent termination effected on 16.2.1995 was in violation of the MEPS Act and the Rules framed thereunder. It was necessary for the school to issue a chargesheet to the teacher, hold an enquiry and then impose a punishment on the teacher. Not having done so, in my view, the school has illegally terminated the services of the teacher. However, in such a case, where the termination has been effected without holding an enquiry it is always open for the management to prove the misconduct before the Tribunal. It is obvious that the termination of the services of the teacher is due to misconduct and is not a simple termination. It is, therefore, necessary to remand the appeal No.15 of 1995 to the Tribunal for the Tribunal to consider whether the misconduct alleged against the teacher, namely, (1) proceeding on unsanctioned leave; (2) not assessing the answersheets of the 4th unit test; (3) leaving work undone before proceeding on leave; and (4) irresponsible and

irregular behaviour causing loss to the students.

12. In the result, Writ Petition No.232 of 1993 is dismissed and Writ Petition No.10576 of 2004 is allowed in the above terms and disposed off accordingly. Appeal No.15 of 1995 remanded to the School Tribunal for a fresh hearing. No costs.